No. 15071

United States
Court of Appeals
for the Ninth Circuit

MAUREEN GARDNER,

Appellant,

vs.

J. J. NEWBERRY CO., INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 4-6-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee.

In the United States District Court for the District of Idaho, Southern Division

No. 3167

MAUREEN GARDNER,

Plaintiff.

vs.

J. J. NEWBERRY CO., INCORPORATED, a Foreign Corporation,

Defendant.

AMENDED COMPLAINT

Plaintiff Maureen Gardner complains and alleges:

I.

That the defendant J. J. Newberry Co., Incorporated, is a foreign corporation, operating in Boise, Ada County, Idaho, and engaged in the business of selling miscellaneous merchandise, including parakeets.

II.

That the jurisdiction of this court is invoked under Title 28 U.S.C., 1952 Ed., Chapter 85, Sections 1331-1332, granting District Courts of the United States original jurisdiction in all civil actions where a matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs, and is between citizens of different states, to wit: Plaintiff, of Oregon, and defendant, of Virginia.

III.

That on December 24, 1954, plaintiff purchased of defendant a parakeet, which defendant had

theretofore offered for sale to the general public in its store in Boise, Idaho, and defendant by so offering said parakeet for sale intended that said parakeet should and would be consumed and used by the purchaser and others thereof as a pet. That defendant thereby impliedly warranted and represented that said parakeet was pure, harmless and wholesome and safe to all persons who might come in contact with the same and defendant knew that such purchaser would rely on the implied warranty and representation as aforesaid; that said parakeet was impure, contaminated and infected with a disease called psitticosis, or parrot's disease, and not reasonably fit for the purpose for which it was purchased and would be used, and the same was not of merchantable quality; that it was within the knowledge of the defendant that said parakeet was to be sold to the general public, of which plaintiff was a member and used by her and others, and defendant then and there impliedly warranted the same to be in all respects fit and proper for the use described herein, and plaintiff relied upon said implied warranty but the same, when sold to plaintiff, was unfit because of the psittocosis, with which it was then infected.

IV.

That plaintiff, by reason of the aforementioned, contracted psitticosis, and suffered greatly in body and mind and limb, and required the services of physicians and surgeons to cure her of the contracted malady, which rendered her sick, lame and sore, with ensuing disability.

V.

That plaintiff did not learn or have notice that the parakeet was infected with psitticosis until early in March, 1955, and thereafter, on or about March 15, 1955, plaintiff, through her agent, gave oral notice to defendant in Boise, Idaho, of her contraction of psittocosis and breach of said implied warranty, as alleged herein.

VI.

That by reason of the premises, plaintiff has been damaged in the sum of $3,500.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $3,500.00, together with her costs and disbursements.

/s/ WALTER M. OROS,

/s/ JOSEPH IMHOFF, JR.,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT

Comes, Now, Defendant and moves to dismiss the amended complaint of the Plaintiff herein upon the ground and for the reason that the same does not

state a claim against Defendant upon which relief can be granted.

Dated: August 30, 1955.

RICHARDS, HAGA & EBERLE,

By /s/ J. L. EBERLE,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 31, 1955.

In the United States District Court for the District of Idaho, Southern Division.

No. 3167

MAUREEN GARDNER,

Plaintiff,

vs.

J. J. NEWBERRY CO., INCORPORATED, a Foreign Corporation,

Defendant.

ORDER

This action is before this Court on a motion by the defendant corporation to dismiss the plaintiff's complaint. Oral argument having been waived, the motion is presented on briefs of counsel.

Plaintiff is a citizen of Oregon. Defendant corporation was incorporated in Virginia, and is doing

business in Idaho. Plaintiff, in her amended complaint, seeks $3,500.00 damages as recompense for disabilities allegedly caused by contracting psitticosis from a parakeet purchased by plaintiff from defendant corporation in its Boise, Idaho, store. This Court has jurisdiction of this action by virtue of 28 U.S.C.A., §1332.

There is no implied warranty of soundness arising in the sale of animals, and it has been held that, where the seller does not know of a latent defect in the animal, there is no implied warranty as to soundness. 77 C.J.S., Sales, §330 (2). "As a general rule, the doctrine of caveat emptor applies to the sale of animals, and there is no implied warranty of soundness, of freedom from disease, or of the breeding qualities of the animal sold, even though purchased for breeding purposes to the knowledge of the seller." 46 Am. Jur., Sales, §393. See also: 2 Am. Jur., Animals, §38.

The Supreme Court of Idaho, in McMaster v. Warner, 44 Idaho 544, 258 P. 547, decided the question of whether an implied warranty of fitness is raised by the sale of an animal. Appellant Warner, in January, 1919, purchased a heifer from respondent, then engaged in the business of breeding registered cattle. The heifer was apparently in good health on the day of the sale, but nine months later it became apparent that she was infected with actinomycosis, or lump-jaw. There was conflicting evidence, however, as to whether the heifer contracted the disease prior to or subsequent to the

sale. The Court declared, at pages 551 et sequitur, that:

"We find the general rule as to implied warranty is aptly stated by the Wisconsin court in McQuaid v. Ross, 85 Wis. 492, 39 Am. St. 864, 55 N. W. 705, 22 L.R.A. 187, wherein the court said:

" 'The doctrine of implied warranty appears to be founded on an actual or presumed knowledge by the vendor, as manufacturer, grower, or producer, of the qualities and fitness of the thing sold for the purpose for which it was intended or is desired, so far as such knowledge is reasonably attainable. The rule must be held to have a rational foundation, and to be not of a purely arbitrary character. It does not impute to the seller knowledge as to qualities or fitness which no human foresight or skill can attain, and raise an implied warranty in respect to them, when the vendor or purchaser are in equal condition as to the means of knowledge.'

"In this case we find nothing in the record showing that respondent, McMaster, knew or should have known that this heifer was likely to become infected with lump-jaw.

"The record does not disclose evidence sufficient to sustain a finding of any catalogue representation which failed, or any statement by respondent which could be construed as a warranty which failed, or breach of any implied warranty."

This enunciation of the law is the latest, and apparently the only, decision of the Idaho Supreme

Court on this question, and is controlling in the instant case. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

There is no allegation in the amended complaint that defendant corporation had knowledge of the fact, if such was the fact, that the parakeet purchased by plaintiff was a carrier of, or infected with, psitticosis, or that said bird's body displayed any visible effects of said disease or that the parakeet manifested any characteristics of psitticosis. In fact, although the parakeet was purchased on December 24, 1954, plaintiff, according to her amended complaint, "* * * did not learn or have notice that the parakeet was infected with psittacosis until early in March, 1955 * * *," or more than two months after said purchase.

Evidently the fact, if such was the case, that the parakeet was diseased was not discernible by a visual examination of the bird. Therefore, as defendant corporation did not have "actual or presumed knowledge" of such a defect in the parakeet, if in fact there was such a defect, there was no implied warranty that the bird was free from disease. Defendant corporation, also, made no express warranty as to the parakeet's freedom from disease. Consequently plaintiff's amended complaint does not state a claim against defendant corporation upon which relief can be granted.

Accordingly it is ordered that the motion of defendant corporation to dismiss be, and the same is hereby, granted.

Dated this 5th day of January, 1956.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed January 5, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Maureen Gardner, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Order of Dismissal rendered in favor of the defendant above named and against the plaintiff, such Order being entered on the 5th day of January, 1956, and from the whole thereof.

Dated: This 4th day of February, 1956.

/s/ WALTER M. OROS,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 4, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby cer-

tify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Amended Complaint.
2. Defendant's Motion to Dismiss Amended Complaint.
3. Order Dismissing Amended Complaint, dated and entered January 5, 1956.
4. Notice of Appeal.
5. Statement of Points on Appeal.
6. Designation of Contents of Record on Appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 6th day of March, 1956.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15071. United States Court of Appeals for the Ninth Circuit. Maureen Gardner, Appellant, vs. J. J. Newberry Co., Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed March 8, 1956,

Docketed: March 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Civil Action No. 3167

MAUREEN GARDNER,

Plaintiff-Appellant,

vs.

J. J. NEWBERRY CO., INCORPORATED, a Foreign Corporation,

Defendant-Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Comes now the appellant, Maureen Gardner, by and through her attorney, and hereby sets forth the points upon which she intends to rely on appeal as follows, to wit:

I.

The Court erred in granting the motion of defendant-appellee to dismiss plaintiff-appellant's amended complaint.

II.

The Court erred in ordering on January 5th, 1956, the dismissal of plaintiff-appellant's amended complaint.

III.

The Court erred in failing to deny defendant-appellee's motion to dismiss plaintiff-appellant's amended complaint.

Dated this 15th day of March, 1956.

/s/ WALTER M. OROS,
Attorney for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1956.